

July 16, 1936

Mr. Franklin C. Hansen,
Boulder, Utah

Dear Sir:

REL: GENERAL

I have your letter of July 7, in which you state: "A has acquired a right to the use of water. However, such use is appurtenant to a specific tract of land. B comes along and takes a stream from A's ditch, 'continuously and openly', for a period of seven years. Such taking may be through B's intimidation of A, and A's inability as to his defending his rights, or through a neighborly act on the part of A to B." You then inquire as to whether A has lost his right to B.

The solution of the above problem, in most cases, involves a complicated question of fact and it is impossible to draw a conclusion as to what rights B has acquired, without going into all of the details. However, the following brief statement of the law applicable may be of help to you:-

A water right may be lost by forfeiture upon continuous non-use for a period of five years, (Revised Statutes 1933, 100-1-4) and after non-use for five years the water again becomes public water and subject to appropriation. There is no requirement that the water be used by the appropriator. It may be used by this lessee or by anyone else using it with the permission of the owner of the right. In such cases the fact that the owner himself may not use the water for a period in excess of five years does not mean that the right is lost. As stated above, the non-use must be continuous. If there is any break in the period of non-use, or in other words, if the owner or anyone holding under him uses the water at any time within the five year period, it would prevent the right from being lost. After a right is lost, there is only one way it can be acquired by anyone else, and that is by filing an Application to appropriate water in the State Engineer's office.

I am unable to determine from your letter whether Moosman wants to change the point of diversion on a natural stream or on an artificial ditch. If he wants to change the point of diversion on a natural stream he must apply to this office. If it is merely a matter of changing the point of diversion on an artificial irrigating ditch, it is enough if he obtains the consent of the irrigation company.

Yours very truly,

T. H. Humpherys,
STATE ENGINEER

EJS/b

C
8